United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1304

To be argued by
Lawrence Stern

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, X

Appellee, DOCKET NO.

: 75-1304

-against-

:

FRANK EVANS,

X

Defendant-Appellant

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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1

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	i,ii
ISSUE PRESENTED.....	1
STATEMENT PURSUANT TO RULE 28(a)(3).....	2
A. PRELIMINARY STATEMENT	
B. STATEMENT OF FACTS	
ARGUMENT	
POINT I WHEN THE TRIAL JUDGE HAS SUA SPONTE VACATED THE CONVICTION OBTAINED BY THE GOVERNMENT ON AN INDICTMENT UNSUPPORTED BY SUFFICIENT EVIDENCE, THE FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY BARS PROSECUTION ON A SECOND INDICTMENT FOR THE SAME ACT ON THE SAME EVIDENCE	10
Conclusion.....	28

TABLE OF AUTHORITIES

PAGE

Cornero v. United States, 48 F.2d 69 (9th Cir.).....11,12

Downum v. United States, 372 U.S. 734 (1963).....11,18,21

Fong Foo v. United States, 369 U.S. 141 (1962).....22

Gori v. United States, 367 U.S. 364 (1961).....11

Green v. United States, 355 U.S. 184 (1957).....14

Illinois v. Somerville, 410 U.S. 458 (1973).....14,15,16,18 21,27

Irizarry v. United States, 508 F.2d 960 (2nd Cir., 1974).....14,22

Morey v. Commonwealth, 108 Mass. 433 (1871).....25

Short v. United States, 91 F.2d 614 (4th Cir, 1937)....25

United States v. Ball, 163 U.S. 662 (1896).....11,16,17,18, 19,21,22

United States v. Beckerman, Docket No. 74-2478 (2d Cir. decided 5-13-75)..9,28

United States v. Cioffi, 487 F.2d 492 (2d. Cir.,1973)..25,26

United States v. Costello, 221 F.2d 668 (2d Cir.1955).. aff'd 350 U.S. 357.....17

United States v. Feola, 16 Cr. L. 3107 (S. Ct. March 19, 1975).....26

United States v. Fistel, 460 F.2d 157 (2d Cir.,1972)...17

United States v. Jenkins, 490 F.2d 868 (2d. Cir.1973).. aff'd 43 U.S.L.W. 4309(1975).22

United States v. Jorn, 400 U.S. 470 (1971).....11,27

United States v. Mallah, 503 F.2d 971(2d Cir.1974).....25

United States v. Sabella, 282 F.2d 206 (2d.Cir.,1959)..19,20,21,23, 24,25,26

TABLE OF AUTHORITIES

PAGE

United States v. Sisson, 399 U.S. 267(1970).....22

United States v. Tateo, 377 U.S. 463 (1964).....19

United States v. Tavoularis, Docket No. 75-1027 (2d. Cir.,decided 5-7-75)...10,22

18 U.S.C. . §2113(c)..... 10,26

18 U.S.C. §2315..... 12,26

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, X

Appellee, DOCKET NO.

: 75-1304

-against-

:

FRANK EVANS,

X

Defendant-Appellant

ISSUE PRESENTED

Whether the Fifth Amendment protection against double jeopardy bars prosecution on a second indictment for the same act on the same evidence after the trial judge has sua sponte vacated the conviction obtained by the government on a prior indictment unsupported by sufficient evidence.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York [Wyatt, J.] . entered on August 11, 1975, denying appellant's motion to dismiss indictment 75 Cr. 562 on grounds of double jeopardy.

Timely notice of appeal was filed.

B. Statement of Facts

On February 21, 1975, appellant was indicted for a one count violation of 18 U.S.C. §2113(c). The indictment, 75 Cr. 176, charged,

> On or about the 9th day of October, 1974 in the Southern District of New York, FRANK EVANS, a/k/a "Frederick Paseka," the defendant, unlawfully, wilfully and knowingly did receive, possess, conceal, store and dispose of money and property, to wit, American Express Travelers Cheques in an approximate amount in excess of $5,000, which had been taken and carried away with intent to steal and purloin while belonging to and in the care, custody, management and control of the First National Bank and Trust Company, Newtown-Yardley Road, Newton, Pennsylvania, the deposits of which were then insured by the Federal Deposit Insurance Corporation, knowing the same to have been so taken.

On May 1, 1975, appellant appeared with counsel before the District Court and offered to withdraw his plea of not guilty to the indictment and offered to plead guilty to the one count indictment. The following colloquy then occured among the Court, appellant, and the United States Attorney:

> Q. Now, first, you understand, putting it in simpler language than is used in this indictment, this charges that you received and had in your possession some American Express Travelers Cheques amounting to more than five thousand dollars in face value and that these Travelers cheques had been stolen from a bank, the First National Bank in Newton, Pennsylvania, and that you knew when you received them or had them in your possession that they had been stolen.
>
> Now, do you understand what the charge is?
>
> A. Yes, your Honor.
>
> Q. Now, remember, Mr. Evans, that I don't know anything about the facts, so I will have to ask you to tell me in your own words what you did which causes you to come here and plead guilty.
>
> A. As you said, your Honor, I knew that the checks were stolen, and I made a name out, and I proceeded to cash them, and there was somewhere around five or six thousand dollars.
>
> Q. In American Express Travelers Cheques?
>
> A. Yes. Various banks cashed them.

Q. So do I understand from what you are now telling me that in some way you got hold of American Express Travelers Cheques and that you attempted to cash them?

A. Yes.

Q. And that when you received them and when you had them in your possession, you knew that they had been stolen from a bank?

A. No. I didn't know that.

Q. You didn't know that they had been stolen?

A. I knew they were stolen, but not from a bank.

Q. You knew that they were stolen, but you didn't know from where they had been stolen?

A. That's right.

Q. I understand. So it's fair to say, is it, that you wilfully, in the sense of knowingly--

A. Yes.

Q. --had in your possession about five thousand dollars' worth of American Express Travelers Cheques, which you knew had been stolen; is that correct?

A. Yes.

Q. So is it fair to say that you are pleading guilty here because you believe you are in fact guilty?

A. Yes, your Honor.

THE COURT: Now, I take it the Government has proof that the Travelers Cheques which Mr. Evans had were in fact stolen from the First National Bank of Newton, Pennsylvania?

MR. HOSKINS: Yes, your Honor. That's correct.

THE COURT: And that that national bank has its deposits insured by the Federal Deposit Insurance Corporation?

MR. HOSKINS: That's correct; and did in October of 1974.

(minutes of 5-1-75 at pp. 4-6)

The Court then noted for the record that appellant appeared in court in a wheel chair and elicited from appallant that he had just completed major surgery for a disease called "diverticulitis." According to appellant, despite the surgery which forestalled his death and despite the fact that the disease was nevertheless "progressing" toward "the critical thing," appellant assured the Court that his "mind is there" and he understood what was happening. (Id. at pp. 870). Upon receiving that assurance, the Court accepted appellant's plea of guilt and set June 20, 1975, as the sentence date.

On June 19, 1975, appellant appeared with counsel before the District Court for sentencing. Immediately at the start of the proceedings the Court announced, "We have a superseding indictment and we are to take the plea of the defendant to the superseding indictment. All right, Mr Clerk" (minutes

of 6-19-75 at p.2). In response to this announcement, counsel asked the Court to refer the superseding indictment to the process of reassignment to a different judge because, "Mr Evans did enter a plea of guilty before your Honor...and indicated all the acts he has committed...[and] We do intend to litigate this case, Judge, in view of certain cases that have been started in the Second Circuit..." (Ibid). The Court denied this application because,

> This is a superseding indictment and the only reason the government asked for a superseding indictment is because when Mr. Evans pleaded guilty he denied that he knew that the American Express Travelers Checks had been stolen from a bank and then apparently a study of the relevant statute under which the old indictment was laid required the government to prove knowledge on the part of the defendant that the Travelers **Checks** had been stolen from a bank and Mr. Evans' answers to my questions denied that he knew that the Travelers Checks had in fact been stolen from a bank... So on the assumption that Mr. Evans, having pleaded guilty to all of the essential elements except knowledge of the theft from a bank, I suppose will plead guilty to the indictment, the superseding indictment. The government laid the superseding indictment under a statute which eliminated that element of the offense...
>
> So there is no basis on which I could conscientiously and responsibly return the case to Part 1. Obviously if Mr. Evans wants a trial he can have one. (Id. at 3-4)

The Court then directed the Clerk to take appellant's plea to the superseding indictment (75 Cr. 562) charging a single count violation of 18 U.S.C. §2315. The indictment, filed June 9, 1975, charged,

> During and about the month of October, 1974, in the Southern District of New York, FRANK EVANS, a/k/a "Frederick Paseka," unlawfully, wilfully and knowingly did receive, conceal, store, sell and dispose of securities, to wit, American Express Travelers Cheques, of a value in excess of $5,000, which were moving as, which were a part of, and which constituted interstate commerce from the State of Pennsylvania to the State of New York, knowing the same to have been stolen, unlawfully converted and taken.

Appellant pleaded not guilty to the superseding indictment, and the Court asked the United Stated Attorney, "which of these indictments does the government propose to try,"and the prosecutor replied, "the superseding indictment, 75 Cr.562, your Honor" (Id. at 4-5). Counsel then raised the double jeopardy claim which would preclude prosecution on the second indictment.

> There are cases in this circuit, judge, that have dealt with this very issue where a man pleads guilty and then a conviction is vacated and he is charged with another indictment alleging the same acts and at least one Second Circuit case, your Honor, has precluded that... the name of that case is United Stated of America against Dominick Sabella and that case,

your Honor, is reported at 272 Federal Reporter Second Series at page 206.

(Id. at 5-6)

The Court perused the cited case, distinguished it, erroneously we submit, on the grounds that sentence had been imposed in that case, and reiterated, "I don't think, as I said before, the defendant has interest in the government's position in the old indictment. The government says it wants to try the superseding indictment and that's what we will be trying." (Id. at 6-7).

Finally, the Court granted counsel's request to submit a brief on the double jeopardy claim, and added, in the following colloquy:

> THE COURT: No, there was not, there was a judgment of conviction and here I have not only never entered a judgment of conviction, but the plea of guilty in the first indictment is hereby set aside and on the first indictment the clerk is directed to enter a plea of not guilty.
>
> MR. GELLER: I respectfully would suggest to your Honor that double jeopardy would attach.
>
> THE COURT: You can argue it in the Court of Appeals if there is a conviction. I don't know that there will be a conviction, but if so it would be a wonderful point for the Court of Appeals.
>
> Now, we will start in this room at 9:30 a.m. on August 12 and we will have our trial. (Id. at 8)

On August 11, 1975, after appellant had filed a memorandum of law in support of his motion, filed simultaneously, to dismiss both indictments, the trial Court denied the motion to dismiss the second indictment, 75 Cr. 562, and, upon submission by the government of a signed order of nolle prosequi with respect to the original indictment, 75 Cr. 176, permitted the nolle prosequi to be filed and endorsed it. In doing so, the trial Court opined,

> There would seem to be no basis, in any event for dismissing the first indictment, there is nothing double about it. In fact, the defendant pleaded guilty to that indictment and it was only my own action in setting aside his plea of guilty that prevented further proceedings on the basis of the guilty plea, and of course the second indictment I don't feel raises any double jeopardy problem. (minutes of 8-11-75 at 2),

and the United States Attorney conceded, "the facts underlying both indictments are precisely the same." (Id. at 3).

Despite this Court's decision in United States v. Beckerman, Docket No. 74-2478, decided May 13, 1975, slip. op. at 3509-10, noticed to the trial Court at the August 11 proceedings, permitting a direct appeal from an order denying a double jeopardy motion, the trial Court refused on that ground to adjourn the trial of the second indictment. However, following examination of appellant by a Court-appointed doctor on August 11, and upon receipt of the doctor's conclusion that appellant was "acutely

and chronically " ill and in too weak a condition to stand trial, the Court adjourned the trial date to October 28, 1975.

ARGUMENT

POINT I

WHEN THE TRIAL JUDGE HAS SUA SPONTE VACATED THE CONVICTION OBTAINED BY THE GOVERNMENT ON AN INDICTMENT UNSUPPORTED BY SUFFICIENT EVIDENCE, THE FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY BARS PROSECUTION ON A SECOND INDICTMENT FOR THE SAME ACT ON THE SAME EVIDENCE

The government, in "an improvident exercise" of its prosecutorial discretion (United States v. Tavoularis, 2d Cir., 5-7-75, Docket No. 75 1027, Slip. Op. 3461-62), charged appellant with violation of a criminal statute (18 U.S.C. §2113(c)) without evidence to support one of the elements of that statute, and then proceeded to a judgment of conviction on that charge. A trial Court, if it is to honor the Fifth Amendment proscription against double jeopardy, may not at government behest vacate the conviction and permit the government to charge defendant for the same acts under a different statute. To do so would be an abuse of judicial discretion, calling for "the safeguard of the Fifth Amendment [because] a judge exercises his authority to help the prosecution, at a trial* in which

*That there is no distinction for double jeopardy purposes between "trial" and guilty plea will be discussed infra.

its case is going badly, by affording it another more favorable opportunity to convict the accused." Gori v. United States, 367 U.S. 364, 369 (1961); Downum v. United States, 372 U.S. 734 (1963); United States v. Jorn, 400 U.S. 470 (1971); United States v. Ball, 163 U.S. 662 (1896). As the Supreme Court said in Downum v. United States, supra, where it reversed a retrial conviction after the trial judge had sua sponte declared a mistrial because the prosecution was unable to proceed with its key witnesses,

> 'The situation is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses.'
>
> 372 U.S. at 737-38 (quoting with approval Cornero v. United States, 48 F.2d 69,71 (9th Cir)). (emphasis supplied)

In this case the admission by the prosecutor that his evidence was insufficient came even later, after conviction. Thus it is clear that any doctrine of "manifest necessity," which in some cases might permit the trial court to sua sponte declare a mistrial without precluding retrial on Fifth

Amendment grounds, does not apply in situations where the mistrial declaration is based on the prosecutor's lack of evidence. Gori v. United States, supra. In Gori the mistrial declaration and subsequent retrial were upheld because the trial court indicated reasons for his action other than that of government lack of evidence (the introduction at trial of other crimes evidence against the defendant), but the Supreme Court warned, as quoted above, against the very situation in this case where lack of evidence was the reason.

It is clear from the proceedings held in the District Court on June 19, 1975, that the Court's vacatur of defendant's conviction on indictment number 75 Cr. 176, charging violation of 18 U.S.C. §2113(c), was at government request to permit it to re-prosecute appellant for the same acts under a second indictment, for violation of 18 U.S.C. §2315, a statute which did not require proof of the element absent in the government's case on the former indictment.

> THE COURT: We have a superseding indictment and we are to take the plea of the defendant to the superseding indictment....
> (p.2)
> The only reason the government asked for a superseding indictment is because when Mr. Evans pleaded guilty he denied that he knew that the American Express Travelers

> Checks had been stolen from a bank and then apparently a study of the relevant statute under which the old indictment was laid required the government to prove knowledge on the part of the defendant that the Travelers Checks had been stolen from a bank... So on the assumption that Mr. Evans having pleaded guilty to all the essential elements except knowledge of the theft from a bank, I suppose will plead guilty to the indictment, the superseding indictment. The government laid the superseding indictment under a statute which eliminated that element of the offense...
>
> (p.3)
>
> The government says it wants to try the superseding indictment and that's what we will be trying...
>
> (p.7)
>
> The plea of guilty in the first indictment is hereby set aside and on the first indictment the clerk is directed to enter a plea of not guilty.
>
> (p.8)

It was not appellant who requested his plea to the former indictment be withdrawn; he was ready for sentence on June 19. The Court's sua sponte vacatur of the plea was purely an accomodation to the government who discovered, too late for double jeopardy purposes, we submit, that it could not supply with its own evidence the element of the crime denied by defendant at the plea proceedings on May 1, 1975. Indeed, the Court could have accepted the plea and entered judgment,

despite appellant's denial of the knowledge element, if the government had come forth with assurance that it had the necessary evidence. Irizarry v. United States, 508 F.2d 960, 967 (2d Cir., 1974). The government's interposition of the superseding indictment and its later nolle prosequi of the former indictment was a concession on its part that appellant was innocent of the crime charged in the former indictment, and further, that the former indictment was groundless. The vacatur of the plea together with the interposition of the superseder was certainly not a manipulation designed to protect the appellant, rather it was designed by the government to cover over a government abuse of discretion with the device of successive prosecutions for a single act until a conviction might be obtained. This is the very abuse of governmental power sought to be prevented by the Double Jeopardy Clause, Green v. United States, 355 U.S. 184, 187 (1957), and it therefore, obviously cannot be "manifest necessity."

In the Supreme Court's latest pronouncement on the doctrine of "manifest necessity," the kind of situation presented by the instant case is distinguished. In Illinois v. Somerville, 410 U.S. 458 (1973), the trial judge had declared a mistrial

after the jury was sworn, because crucial language in the wording of an indictment had been omitted and no amendment was possible under Illinois law. There was no question that the prosecution had the requisite evidence on all the elements of the crime, only that the wording of the indictment omitted one element. On retrial the defendant was convicted. While holding there was "manifest necessity" in that situation, the Supreme Court warned,

> While the declaration of a mistrial on the basis of a rule or a defective procedure that could lend itself to prosecutorial manipulation would involve an entirely different question...such was not the situation in the above cases or in the instant case (410 U.S. at 464)... the trial judge's action was a rational determination, designed to implement a legitimate state policy, with no suggestion that the implementation of that policy in this manner could be manipulated so as to prejudice the defendant... [or] operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case.
>
> 410 U.S. at 469 (emphasis supplied)

The original indictment in the instant case was not merely defective in wording; there was insufficient evidence to support the charge. The trial court's action in this case, therefore, has the same effect as the mistrial warned against in Somerville; it operates "to allow the pro-

secution an opportunity to strengthen its case."

The Somerville case reaffirms another distinction applicable to this case and which again brings this one within the ambit of double jeopardy protection. In upholding the mistrial declaration and retrial in Somerville, where the trial court's reason for his action was a defective indictment, the Supreme Court distinguished its own prior decision in United States v. Ball, 163 U.S. 662 (1896) where it had reversed a retrial conviction obtained after a mistrial declared on the basis of a defective indictment. The difference, said the Court was that in Ball they were, "obviously and properly influenced by the fact that the first trial had proceeded to verdict." Illinois v. Somerville, supra, at 467. In Somerville itself, the mistrial was declared only after the jury had been sworn, well before a verdict had been reached. According to Somerville, then, when a judge declares a mistrial sua sponte, prior to conviction "the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial," (410 U.S. at 467), and further inquiry is necessary to determine the existence or non-existence of a "manifest necessity."

But, after conviction, as in Ball and as in this case, when a judge declares a mistrial sua sponte for reasons of defects in an indictment,* "the conclusion that jeopardy has attached...ends the inquiry as to whether the Double Jeopardy Clause bars retrial." Ibid. As the Court said it in Ball,

> [W]e are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing... [T]he accused, whether convicted or acquitted, is equally put in jeopardy at the first trial...
>
> 163 U.S. at 669 (emphasis supplied)

It should be noted that while retrial was barred after verdict as to the acquitted defendant in Ball, the holding of Ball would have applied to the convicted defendants as well had they not waived any double jeopardy claim by moving them-

*Since there was no evidence to support the element of knowledge of theft from a bank, the first indictment in this case was defective and voidable. United States v. Costello, 221 F.2d 668, 677 (2d Cir.1955) affid. 350 U.S. 357; United States v. Fistel, 460 F.2d 157 (2nd Cir. 1972). Appellant moved that the first indictment be dismissed on these grounds, or that in the alternative the trial court examine the grand jury minutes on that indictment. Both the trial court and the government avoided this motion by the nolle prosequi, but, in the process, we submit, they conceded the lack of sufficient evidence on the first indictment.

selves for the mistrial. The above quoted language from Ball together with the gloss provided by Somerville, also quoted above, makes this clear. Thus, since in this case a conviction was obtained against the appellant on a defective indictment unsupported by evidence, and since the appellant had no role in procuring the vacatur of the conviction, that conviction is a bar to a retrial for the same act. In other words, if double jeopardy bars re-prosecution in a case, "where the district attorney entered upon the trial of the case without sufficient evidence to convict," and this fact was discovered as early as the impaneling of a jury, Downum v. United States, supra, double jeopardy must certainly bar re-prosecution in the same case where the fact is not "discovered" until after conviction.

It is the conviction on a defective indictment which, manifest necessity considerations notwithstanding, establishes the jeopardy and bars re-prosecution, be it conviction on a verdict or, as in this case, a guilty plea. The fact that sentence had not yet been passed or judgment officially entered is irrelevant. In Ball, the Court held, "a verdict of acquittal although not followed by any judgment, is a bar to a subsequent prosecution for the same offense." 163 U.S. 662 at 671 (Again it must be

emphasized that the same result would have attached to the verdicts of conviction in Ball had the trial court sua sponte, declared the mistrial rather than on motion of the convicted defendants). In deciding that a defendant waived his double jeopardy rights against re-prosecution when he collaterally attacked his guilty plea, the Supreme Court in United States v. Tateo, 377 U.S. 463 (1964) assumed that former jeopardy had attached upon the taking of the plea, and went on to say,

> If a case is reversed because of... a deficiency in the indictment... it is presumed that the accused did not have his case fairly put to the jury. A defendant is no less wronged by a jury finding of guilt after an unfair trial then by a failure to get a jury verdict at all; the distinction between the two kinds of wrongs affords no sensible basis for differentiation with regard to retrial.
>
> 377 U.S. at 467.

This Court has said it squarely in United States v. Sabella, 272 F. 2d 206 (1959), a case in which this Court squarely overruled a District Court holding that,"[plea] proceedings in 1955 did not constitute former jeopardy since no sentence could have been legally imposed," (272 F.2d at 208),this Court holding to the contrary that, "it was exposure to a valid judgment of

conviction that constituted defendant's initial jeopardy (Ibid.)*

> The Court of Appeals of Georgia held 50 years later that conviction under a statute prescribing no penalty supported a plea of autrefois convict against an indictment for the same acts under another statute, since the conviction alone deprived the defendant of various civil rights...We think the Georgia Court reached the right result and for the right reason. A judgment of conviction of crime may have serious consequences even if unaccompanied by a valid sentence. 272 F.2d at 210.

We have argued that there was no manifest necessity for the vacatur of the conviction in this case because manifest necessity does not apply where the prosecutor needs the vacatur or mistrial to correct an erroneous prosecution without evidentiary foundation. We have also argued that manifest necessity considerations are cut of this case entirely, at least as far as those considerations

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*In United States v. Ball, supra, the Court held that a valid judgment, albeit voidable, could be had on a defective indictment: "although the indictment was fatally defective, yet, if the Court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable...if the judgment is upon a verdict of guilty, and unrevereed it stands good...163 U.S. at 670. See also United States v. Sabella, supra, where this Court held that jurisdiction over the parties and the territory and the power to determine whether the asserted cause of action was well founded are the elements of jurisdiction "to render a judgment convicting the defendants..." 272 F.2d at 209

permit retrial, because conviction on a defective indictment automatically bars retrial. Thus, even if it be argued that the trial court could not have passed sentence and entered judgment on a guilty plea which did not admit to all of the elements of the crime (F.R. Cr. P. 11), since the trial court accepted the plea, and since the government stood by in silence while it was being accepted (presumably with the knowledge that its indictment was not completely supported by evidence), the conviction thus obtained and then vacated by the trial court, even out of the "necessity" of the Federal Rules, still bars re-prosecution. Ball, Somerville, Downum, Sabella, and the other authorities cited, make this result in this case mandatory under the Fifth Amendment to the Constitution. This result, of course, would not be so mandated in other Rule 11 plea vacatur situations. The differences being 1) that the defendant usually asks to withdraw the plea or seeks its vacatur collaterally or on appeal and thereby waives double jeopardy, and 2) that the plea has usually not been induced by and upon a fatally defective indictment. What has happened in the instant case, in effect, is that the Court has entered a trial order of acquittal on the first indictment. The action of the trial Court in vacating the plea at government request and its order that appellant plead

to the government's superseder and its endorsement of the nolle prosequi of the first indictment is an admission by the government, and by the Court in following its lead, that the evidence is insufficient to support a conviction under the first indictment. Else the plea might have stood on government assurance that it had the evidence (Irizarry, supra) or the plea would simply have been vacated and appellant would have been required to go to trial on the first indictment. Despite the trial Court's failure to "dismiss" the first indictment, it is clear in light of Tavoularis, supra, there was not sufficient evidence to support it, and it had to be nullified in some fashion. Ordering the plea vacated and ordering a plea to a different indictment, and then ordering the nolle prosequi, was the same as finding that appellant could not be convicted on the first indictment, and it was a machination designed to excuse the government's prosecution on insufficient evidence. Such a series of orders is akin to the trial order of acquittal on the first indictment which clearly bars retrial. United States v. Jenkins, 490 F. 2d 868 (2d Cir., 1973) aff'd 43 U.S.L.W. 4309 (1975); United States v. Sisson, 399 U.S. 267 (1970); Fong Foo v. United States 369 U.S. 141 (1962).

Finally, since "the government has proceeded to judgment [i.e., conviction] on a certain fact situation, there can be no

further prosecution of that fact situation alone." United States v. Sabella, supra, at 212. It is clear from a reading of the two indictments in this case,and from the government concession,that the two indictments are directed against the same act or acts of the appellant. Indeed, the second, called a "superseder," was obviously meant to replace the first, not to add to it. The government and the trial Court itself concede that the same conduct of the appellant is common to both indictments.

> ...on the assumption that Mr. Evans, having pleaded guilty to all of the essential elements except knowledge of the theft from a bank, I suppose will plead guilty to the indictment, the superseding indictment...
> (minutes of June 19, 1975 at p. 3)
> ...the facts underlying both indictments are precisely the same.
> (minutes of 8-11-75 at p.3)

No additional facts have been added to the government's case and none need be proven. Indeed, the very purpose of the second indictment was to eliminate needed proof of essential facts, a process of successive indictment by substraction. Double jeopardy protections forbid such successive prosecution notwithstanding government assertions that calling an act by a different criminal name allows the prosecution to drag a defendant through Tille 18 until he's convicted. This Court

said this in Sabella, a case where a voided guilty plea to a sale of narcotics under the importing statute barred a second prosecution under the order form statute.

> The defendant may not later be tried again on that same fact situation, where no significant additional fact need be proved, even though he be charged under a different statute... Here there was one sale of narcotics. The government should have but one opportunity to prosecute on that transaction.
>
> 272 F.2d at 212.
> (emphasis supplied)

In this case, "no significant additional fact need be proved" under the second indictment that would not have been necessary to the government's case under the first indictment. Although the language of the first indictment did not include a specific charge that the Travelers Cheques were a part of interstate commerce, the first indictment did charge in fact that the appellant possessed in the Southern District cheques stolen from a bank in Newton, Pennsylvania. Since under the first indictment, the government would have had to prove that the cheques came from the bank in Pennsylvania and that the appellant possessed them in New York, the interstate nature of the acts committed was integral to the case under the first indictment, and the government would have to prove no more

under the second. The interstate factor was already, and inextricably, a part of its single case under the first indictment. To argue, as the government undoubtedly will, that simply naming this element in the second indictment makes this into two cases, two different offenses, is to "nullify" the substance of the constitutional provision against double jeopardy "by the mere forms of criminal pleading." United States v. Mallah, 503 F.2d 971, 985 (2d Cir., 1974) quoting with approval Short v. United States, 91 F.2d (4th Cir., 1937).

Moreover, it even offends the much criticized (See United States v. Mallah, supra, and United States v. Cioffi, 487 F.2d 492 (2d Cir., 1973)), yet barely surviving, "same evidence" rule.* The evidence of the interstate element of the crime (the act being interstate in character) would have obviously been "required" to "support" a conviction under the first indictment (i.e., without it the government would have had no case), and that same evidence "would have been sufficient to warrant a conviction upon" the second indictment. And, under

*"The evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other." Morey v. Commonwealth, 108 Mass. 433, 434 (1871). This Court called this rule, "the narrowest concept of the protection accorded by the double jeopardy clause." United States v. Sabella, supra at 211.

a "conceivable" set of circumstances (United States v. Cioffi, supra, at 496n3) not present in this case and hence the government's difficulties, proof of possession of goods passed in interstate commerce (the second indictment) might be sufficient to also warrant a conviction for knowledgeable possession of goods stolen from a bank (the first indictment). This, because knowledge is rarely, if ever, directly proved, and the circumstances of an interstate possession could well support knowledge of possession of the same goods having come from a bank. "In effect, then, the same proof could support both convictions" (United States v. Cioffi, supra, at 497), despite the fact that each of the offenses in this case contains a technically unique element (bank knowledge under 2113(c) and interstate passage under 2315). Since in the one case (bank knowledge) the unique element could be inferred from the government's other proof, and since in the other (interstate passage) "the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute" (United States v. Feola, 16 Cr.L. 3107, 3109n9 (S.Ct., March 19, 1975)), the elements are only technically unique and not "significant" for the purposes of double jeopardy. United States v. Sabella, supra.

Surely if the government had achieved a non-voidable, and non-voided, conviction on the first indictment, elemental fairness, which is, after all, the Double Jeopardy Clause, would have mandated the dismissal of the second indictment. To fail to dismiss the second indictment now because the government's conviction on the first defective indictment turned out to be no good, is to allow the prosecution the luxury of bringing defective indictments with impunity and to accept the role of the Court as being one of protector of the prosecution to the disregard of the Constitutional guarantee against government harrassment. A defendant need not show actual prejudice to make out his double jeopardy claim (re-prosecution is the actual prejudice sought to be avoided), and "the Court [in United States v. Jorn, supra] held that the lack of apparent harm to the defendant from the declaration of a mistrial did not itself justify the mistrial..." Illinois v. Somerville, supra, at 469. This Court regards the double jeopardy claim as serious enough to permit appeal to it from an order denying a motion to dismiss an indictment, despite the otherwise interlocutory nature of such an order:

> The collateral rights so determined are 'too important to be denied review,' and those rights 'will have been lost, probably irreparably' after

> final judgment is entered...the constitutional protection against being twice put in jeopardy for the same offense is a 'valued right'...that is too important to be denied review. The protection against double jeopardy guards 'not against being twice punished, but against being twice put in jeopardy'...a final determination of whether jeopardy has attached to the previous trial must, where possible, be determined prior to any retrial, United States v. Beckerman, 2d Cir.,decided 5-13-75, Docket No. 74-2478. Slip op. at 3509-10.

Appellant in this case will have suffered prejudice in this case beyond that of the re-prosecution itself. Unaware that the government's case before the grand jury was inadequate and that he had a defense beyond his own denial, appellant was induced into a needless admission of guilt which could conceivably be used against him at trial on the second indictment, especially if he takes the stand. He must also stand trial before the very judge who took the plea and who, despite the most commendable resolve at objectivity, could not but be affected, as would any other judge who learned of the plea and tried the case in his stead.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE DECISION AND ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND INDICTMENT 75 Cr. 562 SHOULD BE DISMISSED WITH PREJUDICE.

Respectfully submitted

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